TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~443~~ 206

GEORGE OULTON, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

THE SAN FRANCISCO SAVINGS UNION.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED DECEMBER 1, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 443.

GEORGE OULTON, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

THE SAN FRANCISCO SAVINGS UNION.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Writ of error	a	1
Citation and service	b	1
Answer	26	10
Answer amended	28	11
Certificate of county clerk to transcript on return to writ of certiorari	24	10
of district attorney United States	7	4
to judgment-roll	48	19
Certiorari, writ of	1	2
Complaint	10	5
Finding	31	12
Judgment	46	18
Petition of George Oulton, internal revenue collector, for removal of cause, &c.	4	3
Summons	8, 21	4, 9
Exhibit No. 1	50	19

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States, ninth circuit, district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The San Francisco Savings Union, plaintiff, vs. George Oulton, defendant, a manifest error hath happened, to the great damage of the said George Oulton, defendant, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America together with this writ, so that you have the same at Washington in the District of Columbia, on the first Monday of December next, in the said Supreme Court, to be there and then held, that, the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first Monday of December, the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fifth.

[SEAL.] L. S. B. SAWYER, *Clerk.*

The above writ of error is hereby allowed.

LORENZO SAWYER,
Circuit Judge..

b The answer of the judges of the circuit court of the United States, ninth circuit, district of California:

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America within mentioned, at the day and place within contained in a certain schedule to this writ annexed; as within we are commanded.

By the court.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *D. C.*

(Indorsed:) 938. United States Supreme Court. George Oulton, pl'ff in error, vs. The San Francisco Savings Union. Writ of error. Filed November 2d, 1871. L. S. B. Sawyer, clerk, by J. F. O'Beirne, D. C.

c UNITED STATES OF AMERICA, *ss:*

To The San Francisco Savings Union, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held at the city of Washington in the District of Columbia, on the first Monday of December, A. D. 1871, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, ninth circuit, district of California, wherein George Oulton is plaintiff in error, and you are defendant in er-

ror, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, chief justice of the Supreme Court of the United States of America, this second day of November, A. D. 1871, and of the Independence of the United States the 96th.

[SEAL.] LORENZO SAWYER,
Circuit Judge.

U. S. MARSHAL'S OFFICE, *District of California:*

I hereby certify that I served the within citation on The San Francisco Savings Union by delivering personally to John R. Jarboe, their attorney, a true copy thereof, in the city of San Francisco, this 4th day of November, A. D. 1871.

WM GOUVERNEUR MORRIS,
U. S. Marshal.
By BENJ. F. CARVER, *Deputy.*

(Indorsed:) 938. United States Supreme Court. George Oulton pl'ff in error, vs. The San Francisco Sav'g's Union, def't in error. Citation. Filed Nov. 4, 1871. L. S. B. Sawyer clerk.

1 *Certiorari.*

UNITED STATES OF AMERICA.

Circuit court of the United States, ninth circuit, district of California.

To the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, greeting:

Whereas we have understood from the petition of George Oulton, duly sworn and certified according to the provisions of the act of Congress of the United States in such case made and provided, that an action is now pending before you, in a case wherein the San Francisco Savings Union is plaintiff, and George Oulton is defendant, and it further appearing to our satisfaction from the petition aforesaid that said action is brought to recover the sum of three thousand and sixty-six $\frac{63}{100}$ dollars alleged to have been unlawfully collected as taxes of said plaintiff by the defendant in his officihl capacity as a United States revenue officer under the internal revenue laws:

You are therefore required to send to our circuit court of the United States the record and proceedings in said cause, and have the same
2 at the city of San Francisco in the district aforesaid forthwith.

Witness the Honorable Salmon P. Chase, chief justice of the Supreme Court of the United States, this 25th day of March, in the year of our Lord one thousand eight hundred and seventy-one, and of our Independence the ninety-fifth.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE,
Deputy Clerk.

3 (Endorsed.)

OFFICE OF THE U. S. MARSHAL,
District of California:

I hereby certify that I have served the within writ of certiorari on the district court of the 15th judicial district of the State of California, in

and for the city and county of San Francisco, by delivering to Jno. Hanna, clerk of said court, a certified copy of the same on the 25th day of March, 1871, at San Francisco, Cal.

W'M GOUVRENEUR MORRIS,
U. S. Marshal.
By ALLEN TILLINGHAST, *Deputy.*

Filed March 25, 1871. L. S. B. Sawyer, clerk. By J. F. O'Beirne, D. C.

4 *Petition of G. Oulton, int. rev. coll., for removal of cause from State court.*

To the honorable the circuit court of the United States, ninth circuit, within and for the district of California:

The petition of George Oulton respectfully represents to this honorable court that, he is now and for nearly one year last past, continuously has been an internal revenue officer of the United States within and for the first collection district of California, namely, a collector of internal revenue, duly appointed under and acting by authority of an act of Congress entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," passed June 30th, 1864, and the acts of Congress amendatory thereof and in addition thereto; and that a suit has been brought against him by summons in the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, by the San Francisco Savings Union, a corporation incorporated under the laws of the State of California, and having its office and principal place of business in the city and county of San Francisco, State of California, to recover the sum of three thousand and sixty-six $\frac{63}{100}$ dollars, as will appear by reference to the summons served in said case, which is
5 hereto attached and made a part of this petition.

Your petitioner further respectfully represents, that said suit is brought against petitioner to recover the sum of three thousand and sixty-six $\frac{63}{100}$ dollars collected by him under the internal revenue laws as an officer of the United States, to wit, as collector of internal revenue as aforesaid, and which said sum is alleged to have been wrongfully collected by him from plaintiff as taxes, on an assessment made by the assessor of internal revenue within and for the first district of California, against the said plaintiff for and on account of taxes due to the United States from the said plaintiff on its monthly bank deposits and bank capital.

Wherefore, petitioner prays that said suit may be removed from the State court to this honorable court in accordance with the provisions of the act of Congress in such case made and provided.

GEO. OULTON,
Coll'r Int. Rev. 1st Dist. Cal.

STATE OF CALIFORNIA,
City and county of San Francisco, ss:

George Oulton, being duly sworn, deposes and says that he is
6 the defendant in the case of The San Francisco Savings Union against George Oulton, now pending in the district court of the fifteenth judicial district, in and for the city and county of San Francisco, State of California; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge,

except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

GEO. OULTON.

Subscribed and sworn to before me this 24 of March. A. D. 1871.

L. S. B. SAWYER,
Com'r U. S. Cir. C't, &c.

7 *Certificate of dist. attorney.*

I, L. D. Latimer, do hereby certify that, as counsel for petitioner, I have examined the foregoing petition of George Oulton; that I have examined the proceedings in the case of the San Francisco Savings Union against said George Oulton, and have carefully inquired into all the matters set forth in said petition, and I believe the same to be true.

I do further certify that I am an attorney and counsellor at law, duly admitted and licensed to practice in all the courts of the State of California.

LORENZO D. LATIMER,
Counsel for Petitioner.

(Endorsed:) Filed 24th March, 1871. L. S. B. Sawyer, clerk.

8 *Summons.*

In the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco.

THE SAN FRANCISCO SAVINGS UNION, plaintiff,
vs.
GEORGE OULTON, DEFENDANT.

Action brought in the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said district court.

The people of the State of California send [greeting to George Oulton, defendant.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, and to answer the complaint filed therein, within ten days (exclusive of the day of service), after the service on you of this summons—if served within this county, or, if served out of this county, but in this district, within twenty days; otherwise, within forty days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover the sum of $3,066.63, alleged to be due from defendant to plaintiff for taxes illegally assessed
9 against plaintiff and collected by defendant, which said amount of taxes were paid by plaintiff under protest, all of which is fully set out in the complaint filed herein, to which reference is hereby expressly made; also for costs of suit.

And you are hereby notified that if you fail to appear and answer the

said complaint, as above required, the said plaintiff will take judgment against you for said sum of $3,066.63 and costs of suit.

Given under my hand and seal of the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, this 15th day of March, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] JOHN HANNA, *Clerk.*
By A. S. ELDRIDGE, *Deputy Clerk.*

(Endorsed:) Rec'd March 18th, 1871, at 11 o'clock, a. m. Geo. Oulton, collector.

10 *Complaint.*

In the district court of the fifteenth judicial district, of the State of California, in and for the city and county of San Francisco.

SAN FRANCISCO SAVINGS UNION, PLAINTIFF,
vs.
GEORGE OULTON, DEFENDANT.

San Francisco Savings Union complains of George Oulton, defendant, and alleges:

I. That said San Francisco Savings Union is now, and was at all the times hereinafter named, a corporation duly incorporated as such under the laws of the State of California, and having its office and principal place of business in the city and county of San Francisco.

II. That said corporation is formed under the provisions of an act of the legislature of the State of California, entitled "An act to provide for the formation of corporations for the accumulation and investment of funds and savings," approved April 11th, 1862, and the acts amendatory thereof, and supplementary thereto.

III. That said corporation has never been engaged in the business of banking, and has never had or held on deposit with it any sum
11 or sums of money whatever subject to payment by check or draft, or represented by certificate of deposit, or represented in any other manner than as hereinafter stated; and has never had or held on deposit any sum or sums of money payable to any person or persons on demand or payable in any other manner than is hereinafter stated; that no credits have ever been opened with said plaintiff by the deposit or collection of money or currency subject to be paid or remitted upon draft, check or order; that no money has ever been advanced or loaned by said plaintiff on stocks, bonds, bullion, bills of exchange, or promissory notes have ever been received by it for discount or sale.

IV. That said corporation has been at all the times since its incorporation engaged solely in the business of receiving such monies as were placed in its hands by those doing business with it, lending and investing said monies solely upon mortgages upon real estate, and applying the interest arising from said investment—

1st. To the payment of the expenses of conducting the business of said corporation.

2nd. To the creation of a reserve fund for the security of those doing business with it; and

3rd. To the payment of the remaining portion of said interest pro rata, to such persons as had placed money with it for keeping and investment.

V. That all monies ever at any time placed or left with it, said
12 plaintiff, for safe-keeping or investment, have been so placed, subject to the provision of a contract between the person so placing the same, and this plaintiff, which said contract is hereto annexed, marked "Exhibit A," and made part hereof, and that no monies have ever been received, kept, or held by said plaintiff from any person or persons except under the provisions of said contract and repayable only as therein provided.

VI. That the defendant in this action, George Oulton, is now and was at all the times hereinafter named, collector of taxes for the first collection district of California; that before the 23rd day of February, A. D. 1871, he did demand of this plaintiff the sum of three thousand and sixty-six & $\frac{63}{100}$ dollars, which amount he pretended and alleged was the amount of taxes assessed to and due from this plaintiff as and for the one twenty-fourth ($\frac{1}{24}$) of one per cent. per month for monies deposited with this plaintiff in the business of banking during the months of August and September, 1870, and pretending that the said sum of three thousand and sixty-six & $\frac{63}{100}$ dollars was due from this plaintiff for delinquent taxes; that this plaintiff refused to pay said sum to said defendant; and that on the 23rd day of February, A. D. 1871, said defendant did levy upon and seize all the money and property of this plaintiff in the State of California for the non-payment of
13 said taxes illegally assessed as aforesaid, and was about to expose said property for sale, and sell the same to collect the amount of said tax illegally assessed as aforesaid and claimed by said defendant, and that to release said property from said levy and prevent the sale thereof, this plaintiff did, under protest, pay to said defendant the said sum of three thousand and sixty-six & $\frac{63}{100}$ dollars, whereupon said Oulton did release said property from said levy and return the same to this plaintiff; that plaintiff did afterwards demand of said Oulton the repayment to him of said sum of three thousand and sixty-six & $\frac{63}{100}$ dollars, but that said Oulton refused to pay the same to this plaintiff, and has since paid the same into the Treasury of the United States; that this plaintiff did duly appeal to the commissioner of internal revenue of the United States according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, from the assessment of the said taxes pretended as aforesaid to be assessed against it as hereinabove set forth, and to collect which said levy was made, and that upon such appeal said commissioner decided that said appeals were not well taken; and that said taxes were legally assessed; and that said decision was made within six months next before the commencement of this action.

14 Wherefore plaintiff prays judgment against said defendant for the sum of three thousand and sixty-six & $\frac{63}{100}$ dollars and costs of suit.

JARBOE, HARRISON & ROBINSON,
Attorneys for Plaintiff.

"EXHIBIT A."

Conditions of agreement on which deposits may be made with and will be repaid by the San Francisco Savings Union, incorporated June 18th, 1862, under the act to provide for formation of corporations for the accumulation and investment of funds and savings, approved April 11th, 1862.

1st. Ordinary deposits will be received in sums of not less than one

dollar, for drawing which notice may be required as specified below, and term deposits in sums of not less than one hundred dollars on a stipulation that at least six months' notice shall be given in writing at the office of the corporation before drawing them. A maximum limit for deposits shall be fixed from time to time by the board of directors. The amounts deposited and drawn out by each depositor shall be entered in his pass-book, or certificates will be issued for term de-
15 posits if prefer'ed. The directors have power at any time to refuse any or all deposits.

2nd. As the deposits must be loaned out or otherwise invested, in order that interest may be gained upon them, the corporation will only engage to repay depositors when there is money on hand which the board of directors may not deem it necessary to reserve for other payments. As long as this is the case the cashier will repay term deposits on the expiration of the term of notice given, and ordinary deposits on demand or after expiration of the following notice, whenever the directors may require such notice of the depositors, namely: For sums over $50, and less than $100, three days. For sums of $100 and over, and less than $1,000, ten days. For sums of $1,000 and upwards, thirty days.

In case the depositor who may have applied for an ordinary deposit shall not come forward to receive his money within three days after the term of notice shall have expired, the application will be considered as withdrawn. If, in the same manner, term depositors should not come forward, their notice will be considered cancelled.

If a term depositor should wish to withdraw his deposit or to change it to an ordinary one, the board of directors may consent to his doing so if they shall see fit, but in case of such change, said depositor shall loose one month's dividend upon his deposit.

16 All changes made by the board of directors in the foregoing conditions and all further conditions established by them shall be posted in the office of the corporation during at least sixty days before they shall come into operation. And such changes or further conditions will in nowise affect deposits made previously.

3rd. When there is not money enough on hand to repay all the deposits applied for, the directors shall make no new loans nor investments, until there is again sufficient money on hand to meet the current applications; and if the demand shall, in their judgment, become excessive or general, they shall have power to set aside all applications previously made, which may not have been satisfied, and order an apportionment of all the funds as they may be got in, and at such short intervals as they may judge proper, among all the ordinary depositors, in proportion to the amount of their deposits; term depositors, who shall have given notice, shall, as soon as the stipulated term of notice shall have passed, be placed on the same footing as ordinary depositors, whose notice has expired, and any funds not called for when thus apportioned shall be carried into the next periodical apportionment. But the directors shall, in all circumstances, have power to provide for the expenses of the corporation, and for any other lawful payments which they may deem necessary, (such as dividends, loans, or
17 investments previously contracted for, &c.,) before making any apportionment.

4th. At the expiration of every six months, ending June 30th and December 31st, of each year, the board of directors shall ascertain the net profits of the corporation, and not less than nine-tenths of the same will be appropriated for a dividend, to be declared payable upon the guarantee capital, (capital stock,) the reserve fund, and all deposits at

such monthly or yearly rate as the total amount of net profits may permit. The amount of dividend apportioned upon each account shall be in proportion to the time during which the several amounts represented by such account shall have formed part of the funds of the corporation, except that deposits will not begin to draw dividend until one month after they are made; and the rate of dividend upon ordinary deposits shall be increased by twenty per cent., to form the rate upon funds remaining permanently in the hands of the corporation, including term deposits. The remaining portion of net profits shall belong to the stockholders of the corporation, in compensation for the guarantee which their guarantee capital affords to depositors, but out of said portion enough shall be set aside, from time to time, to form a reserve fund, which, although belonging to the stockholders, shall not be withdrawn or paid to them until the dissolution of the corporation, but it may be converted into guarantee capital, and the formation of a new reserve fund provided for.

18 Dividends will be payable during the six months next after the date on which they may have been declared, in preference to deposits, but thereafter they shall be considered as deposits, and will be payable only in the same way as the balances of the accounts to which they may belong, and all dividends not drawn within the first thirty days will share in the next dividend from the date on which they have been declared.

The board of directors shall, from time to time, determine and make known a rate of interest to be paid to depositors who may wish to take such rate in lieu of dividend. On drawing the balances of their accounts between one dividend day and another, neither this rate of interest nor dividends shall be paid upon fractions of dollars. On all amounts drawn out during any time when the making of new loans is declared suspended, on account of excess of applications for repayment, no interest or dividend will be allowed from and after the date of the next previously-declared dividend, unless the applications for such amounts shall have been made at least three days previously to such declaration that no new loans are being made.

5th. The directors will use their best judgment in making loans or investments within the limitations of the statute under which The San Francisco Savings Union is incorporated, looking first and prin-

19 cipally to security, and in the second place to profit, all interest, rent, or other revenues received by the corporation, and any profit or loss which it may make on the purchase and re-sale of any real estate on which the corporation may make loans, or on personal property in the cases provided for by the statute, shall be added to or taken out of the next dividend. All losses of the principal sum of amounts loaned, or of any part of such principal sum shall be paid out of the reserve fund as soon as the property shall be disposed of, and the principal sum shall be accounted for before reckoning interest.

The reserve fund shall be kept up from the same source from which it is to be formed, and if it shall at any time be insufficient to meet all the losses suffered, then these shall be paid out of the guarantee capital, so that the said reserve fund, together with the guarantee capital and the assets of the corporation, shall form an absolute security to depositors for the amount of their deposits and declared dividends.

6th. It is distinctly agreed and understood that, in consideration of the security thus afforded each depositor, by signing these conditions, waives any and all claim or claims, whether founded upon the statutes or upon the constitution of this State, which, without this stipulation

he might have to hold any individual corporator or corporators, officers, members, or stockholders of this corporation, or his her, or
20 their heirs, executors, administrators, or assigns, personally liable, jointly or severally, for any losses, and consents to look for his or her security solely to the guarantee capital, to the reserve fund and assets of the corporation.

I, , having been made acquainted with the above conditions, am satisfied with the same, and I do hereby agree to be governed by them in regard to any and all deposits which I may make with the San Francisco Savings Union. In testimony whereof I have hereunto subscribed my name.

San Francisco, , 18 .

(Endorsed:) Filed March 13th, 1871. John Hanna, clerk. By A. S. Eldridge, deputy clerk.

21 *Summons.*

In the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco:

SAN FRANCISCO SAVINGS UNION, PLAINTIFF,
vs.
GEORGE OULTON, DEFENDANT.

Action brought in the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said district court.

The people of the State of California send greeting to George Oulton, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise, within forty days, or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover the sum of $3,066.63, alleged to be due from defendant to plaintiff, for taxes illegally
22 assessed against plaintiff, and collected by defendant, which said amount of taxes were paid by plaintiff under protest; all of which is fully set out in the complaint filed herein, to which reference is hereby expressly made; also, for costs of suit.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment against you for said sum of $3,066.63, and costs of suit.

Given under my hand and seal of the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, this 15th day of March, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] JOHN HANNA, *Clerk.*
By A. S. ELDRIDGE, *Deputy Clerk.*

23 (Endorsed:)

OFFICE OF THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the within summons on the 16th day of March, A. D. 1871, and personally served the same on the 18th day of March, A. D. 1871, upon George Oulton, the within-named defendant, by delivering to said defendant, personally, in the city and county of San Francisco, a copy of said summons attached to a copy of the complaint in said action therein named. Dated at San Francisco, this 18th day of March, 1871.

P. J. WHITE, *Sheriff.*
By GEO. W. CORBELL, *Deputy Sheriff.*

Filed March 21st, 1871.

JOHN HANNA, *Clerk.*
By A. S. ELDRIDGE, *Deputy Clerk.*

24 *Certificate of county clerk to transcript on ret. to writ of certiorari.*

In the district court of the 15th judicial district of the State of California, in and for the city and county of San Francisco.

SAN FRANCISCO SAVINGS UNION, PLAINTIFF,
vs.
GEORGE OULTON, DEFENDANT. } No. 6547.

In return to the writ of certiorari, issued from the circuit court of the United States, ninth circuit, district of California, a certified copy of which was filed in my office on the 25th day of March, 1871, I, Jno. Hanna, county clerk of the city and county of San Francisco, and ex-officio clerk of the district court of the 15th judicial district of the State of California, in and for the city and county of San Francisco, do hereby certify the foregoing to be full, true, and correct copies of original papers on file in my office in the above-entitled cause, and of the whole thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 3rd day of April, A, D. 1871.

[SEAL.]

JOHN HANNA, *Clerk.*
By A. S. ELDRIDGE, *Deputy Clerk.*

25 (Endorsed:) Filed 7th April, 1871, L. S. B. Sawyer, clerk.

26 *Answer.*

United States circuit court, ninth circuit, district of California.

SAN FRANCISCO SAVINGS UNION,
vs.
GEORGE OULTON.

And now into court comes the above-named defendant, by L. D. Latimer, his attorney, and for answer to the complaint of plaintiff, denies each and every allegation in said complaint contained.

Wherefore this defendant prays to be dismissed with judgment against the plaintiff for his costs in this wise expended.

L. D. LATIMER,
Attorney for Defendant.

APRIL 22, 71.

27 Copy of within answer acknowledged Ap'l 22, 1871.

JARBOE, HARRISON & ROBINSON,
Attorneys for Plaintiff.

(Endorsed:) Filed 22 April, 1871. L. S. B. Sawyer, clerk.

28 *Amended answer.*

United States circuit court, ninth circuit, district of California.

THE SAN FRANCISCO SAVINGS UNION
vs.
GEORGE OULTON. } No. 938.

Now comes the defendant, and leave of court having first been obtained, makes this his amended answer to the complaint herein, and denies each and every allegation in said complaint contained.

For a further answer to said complaint, the defendant avers that the plaintiff is, and was at the times stated in the complaint, and for a long time prior thereto had been, a corporation engaged in the business of banking, and then had and held deposits of money, aggregating many thousands of dollars, made with them by numerous persons, subject to payment by check and draft, and represented by certificates of deposit, by entries in pass-books and otherwise, a part of which said deposits are payable upon demand, and a part at a fixed and determined future day; and the defendant avers that credits have been opened with said plaintiff by numerous persons, by the deposit of money subject to be paid upon order; that the plaintiff was incorporated with and
29 has a capital stock of $250,000.00; that it does and for more than two years last past continuously has done business other than receiving deposits to be loaned or invested, for the sole benefit of the parties making such deposits, without profit or compensation to plaintiff; and the defendant avers that, during the times last aforesaid, the plaintiff has received and loaned such deposits for the benefit of itself, as well as of the parties making the deposits, and with great profit, and compensation to the plaintiff therefrom.

The defendant further avers that, in disregard of the requirements of law, the plaintiff failed and refused to make to the assessor of internal revenue for the first collection district of the State of California, the same being the collection district in which the plaintiff had and have their place of business, and were and are carrying on the business aforesaid, any return of the average amount of the deposits of money with them for the months of August and September, 1870; and that thereupon, in pursuance of the requirements of law, the said assessor estimated, from the best information he could obtain, the amount of such deposits for said months, which estimate was confirmed by the Commissioner of Internal Revenue; and that upon such estimate he assessed the tax afterwards collected by the collector of internal
30 revenue of said district, the same being the tax named in the complaint, and sought to be recovered back in this action.

Wherefore this defendant prays to be dismissed with judgment against the plaintiff for his costs in this wise expended.

Sept'r 22d, 1871.

L. D. LATIMER,
Attorney for Defendant.

(Endorsed:) Filed Sept. 25, 1871. L. S. B. Sawyer, clerk. By J. F. O'Beirne, D. C.

31 *Findings.*

In the U. S. circuit court, ninth circuit, district of California.

THE SAN FRANCISCO SAVINGS UNION }
v.
GEORGE OULTON. }

This cause came on regularly for trial before the court, without a jury, (a jury having been waived by the parties by stipulation in writing duly filed,) on the 25th day of September, A. D. 1871, John R. Jarboe, esquire, appearing for the plaintiff, and L. D. Latimer, esquire, U. S. district attorney for the defendant, and was submitted upon the evidence introduced, and argument of counsel; and the court, now being sufficiently advised, finds the following facts and conclusions of law:

At the time mentioned in the complaint the plaintiff was, and it now is, a corporation duly organized under and governed by the provisions of the statute of California entitled "An act to provide for the formation of corporations for accumulations and investment of funds and savings," approved April 11, 1862, (Stat., Cal., 1862, 199,) and subsequent acts amendatory thereof. It had its principal place of business at San Francisco, in the State of California. Said plaintiff has a capital
32 stock of one hundred thousand dollars. The capital stock is a part of the security which the depositors have. The said plaintiff receives deposits, loans them out, and repays them, together with the dividends arising from interest on said loans, to the depositors upon the terms and conditions, and upon the plan stated in an agreement which each and every depositor signs when he or she makes the first deposit. A copy of said agreement is annexed to the complaint as "Exhibit A," and is in the words and figures following, to wit:

"CONDITIONS OF AGREEMENT on which deposits may be made with and will be repaid by the San Francisco Savings Union, incorporated June 18, 1862, under the act to provide for the formation of corporations for the accumulation and investment of funds and savings approved April 11, 1862.

"1st. Ordinary deposits will be received in sums of not less than one dollar, for drawing which notice may be required as specified below, and term deposits in sums of not less than one hundred dollars, on a stipulation that at least six months' notice shall be given in writing, at the office of the corporation, before drawing them. The amounts deposited and drawn out by each depositor will be entered in his pass-book, or certificates will be issued for term deposits, if preferred.

"All deposits shall remain with the institution until called for by the depositor or his legal representatives. The directors have power
33 at any time to establish a maximum limit for deposits, as well as to refuse any deposit.

"2nd. As the deposits must be loaned out or otherwise invested in order that interest may be gained upon them the corporation will only engage to repay depositors when there is money on hand which the board of directors may not deem it necessary to reserve for other payments. As long as this is the case the cashier will repay term deposits on the expiration of the term of notice given, and ordinary deposits on

demand or after expiration of the following notice, whenever the directors may require such notice of the depositors, namely:

"For sums over $50 and less than $100, three days.

"For sums of $100 and over, but less than $1,000, ten days.

"For sums of $1,000 and upwards, thirty days.

"In case the depositor who may have applied for an ordinary deposit shall not come forward to receive his money within three days after the term of notice shall have expired the application will be considered as withdrawn. If in the same manner term depositors should not come forward their notice will be considered cancelled.

"If a term depositor should wish to draw his deposit or to change it to an ordinary one the board of directors may consent to his doing
34 so if they shall see fit, but in case of such change said depositor shall lose one month's dividend upon his deposit.

"3rd. When there is not money enough on hand to repay all the deposits applied for the directors shall make no new loans nor investments until there is again sufficient money on hand to meet the current applications, and if the demand shall, in their judgment, become excessive or general they shall have power to set aside all applications previously made which may not have been satisfied, and to order an apportionment of all the funds as they may be got in, and at such short intervals as they may judge proper, among all the ordinary depositors in proportion to the amount of their deposits. Term depositors who shall have given notice shall, as soon as the stipulated term of notice shall have passed, be placed on the same footing as ordinary depositors whose notice has expired; and any funds not called for when thus apportioned shall be carried into the next periodical apportionment. But the directors shall in all circumstances have power to provide for the expenses of the corporation, and for any other lawful payments which they may deem necessary, (such as dividends, loans, or investments previously contracted for &c.,) before making any apportionment.

35 "4th. At the expiration of every six months ending June 30th and December 31st of each year, the board of directors shall ascertain the net profits of the corporation and shall determine the amount to be appropriated for a general dividend. Not less than nine-tenths of said amount shall form a dividend, to be declared and payable upon the guarantee capital, (capital stock,) the reserve fund, and all deposits at a monthly or yearly rate.

"The amount of divided apportioned upon each account shall be in proportion to the time during which the several amounts represented by such account shall have formed part of the funds of the corporation, except that deposits will not begin to draw dividend until one month after they are made; and the rate of dividend upon ordinary deposit shall be encreased by twenty per cent. to form the rate upon funds remaining permanently in the hands of the corporation, including term deposits. The remaining portion of the amount for general dividend determined by the board of directors as aforesaid shall belong to the stockholders of the corporation in compensation for the security which their guarantee capital affords to depositors, but out of said portion enough shall be set aside from time to time to form a reserve
36 fund, which, although belonging to the stockholders, shall not be withdrawn or paid to them until the dissolution of the corporation; but it may be converted into guarantee capital and the formation of a new reserve fund provided for.

"5th. Dividends will be payable during the six months next after

the date on which they may have been declared, in preference to deposits; but thereafter they will be payable only in the same way as the balances of the accounts to which they may belong, and all dividends not drawn within the first thirty days will share in the next dividend from the date on which they have been declared.

"The board of directors shall, from time to time, establish a rate of interest to be paid to depositors who may wish to take such rate in lieu of dividend, on drawing the balances of their accounts between one dividend day and another. Neither this rate of interest nor dividends shall be paid upon fractions of dollars.

"On all amounts drawn out during any time when the making of new loans is declared suspended on account of excess of applications for repayment, no interest or dividend will be allowed from and after the date of the next previously-declared dividend unless the
37 applications for such amounts shall have been made at least three days previously to such declaration that no new loans are being made.

"6th. The directors will use their best judgment in making loans or investments, within the limitations of the statute under which the San Francisco Savings Union is incorporated, looking first and principally to security, and in the second place to profit.

"All interest, rents, or other revenues received by the corporation, and any profit or loss which it may make on the purchase and re-sale of any real-estate on which the corporation may make loans, or on personal property in the cases provided for by the statute, shall be added to, or taken out of the next dividend.

"All losses of the principal sum of amounts loaned, or of any part of such principal sum, shall be paid out of the reserve fund, as soon as the property shall be disposed of, and the principal sum shall be accounted for before reckoning interest. The reserve fund shall be kept up from the same source from which it is to be formed, and, if it shall at any time be insufficient to meet all the losses suffered, then these shall be paid out of the guarantee capital, so that the said reserve fund,
38 together with the guarantee capital and the assets of the corporation, shall form an absolute security to depositors for the amount of their deposits and declared dividends.

"7th. It is distinctly agreed and understood that, in consideration of the security thus offered, each depositor by signing these conditions waives any and all claim or claims, whether founded upon the statutes or upon the constitution of this State, which without this stipulation he might have, to hold any individual corporator or corporators, officers, members, or stockholders of this corporation, or his, her, or their heirs, executors, administrators, or assigns, personally liable, jointly or severally, for any losses, and consents to look for his or her security solely to the guarantee capital, to the reserve fund and assets of the corporation.

"I , having been made acquainted with the above conditions, am satisfied with the same, and I do hereby agree to be governed by them in regard to any and all deposits which I may make with the San Francisco Savings Union. In testimony whereof I have hereunto subscribed my name.

"San Francisco, 18 ."

39 Every depositer upon making a deposit signs the foregoing written agreement, and no moneys are or were during the time mentioned in the complaint received on deposit, or held, otherwise than upon the terms and conditions as set forth in the foregoing conditions and agreement.

No accounts have ever been opened or moneys received subject to payment on draft, check, or order. When a deposit is made a pass-book is given to the depositor, and an entry of the deposit made in it and in the books of the bank.

When the money is drawn the depositor presents his pass-book, receives his money and signs a receipt for it in the books of the bank, and an entry is made in the pass-book. Sometimes the depositer cannot appear in person to receive his money. He then sends an order with the pass-book, and on the production of the pass-book and order the order is taken as a receipt and pasted in the receipt book in the place of the receipt, and the entry made in the pass-book.

No such order is ever paid without a presentation of the pass-book with the order. In practice, although not obliged to do so, the plaintiff always intends to keep sufficient money on hand to meet all ordinary calls when made, and it always pays upon call, so long as there is money to do so. There have been one or two occasions since the organization of the plaintiff that it has not been able to meet on call all ordinary demands; one for two or three weeks about two years ago, when there was a heavy demand for money.

Loans are usually made on real-estate. This is the regular mode and business of the plaintiff. But when unable to put all the deposits out on real estate, plaintiff loans on other securities, such as mint certificates, U. S. bonds, State bonds, Oakland, San Francisco, and other bonds, San Francisco Gas Company and Spring Valley Water Works Company's stocks.

But this is not the regular business of the plaintiff, and such loans are but temporary. Plaintiff does not loan on bills of exchange, or promissory notes without mortgages, and does not pay out money on drafts or checks.

Plaintiff does not in any sense do a collection business. Plaintiff issues certificates for term deposits not transferable, but the certificates are issued subject to the foregoing agreement. The certificate when made out is cut from a corresponding stub, and before delivery the party receiving it signs the receipt upon the stub, showing that it is received subject to the conditions of the said agreement upon which deposits are received. Said stub or tag and certificates are in the form, words, and figures following:

Special certificate of term deposit.

SAN FRANCISCO SAVINGS UNION.

Special certificate of

No. 1106.] [$

SAN FRANCISCO SAVINGS UNION.

Incorporated [cut] 18th June, 1862.

Term deposit No. 1107.

SAN FRANCISCO, 187 .

For $

This certifies that has deposited with the San Francisco Savings Union the sum of dollars, as a term deposit, subject to the conditions of agreement with depositors, established by this corporation. This amount is payable to said depositor at the expiration of a term of not less than six months from the time that notice of demand of payment thereof shall have been given to said corporation, in writing, at its office. The said sum of money can be transferred only on the books of said corporation by said depositor or duly authorized agent.

Dated 187 .

Deposited by

No.

on the

This certificate is not transferable.

This certificate is issued at the request of said depositor, by virtue of an act of the legislature of the State of California approved March 28, 1868, entitled "An act supplementary to an 'act to provide for the formation of corporations for the accumulation and investment of funds and savings,' approved April 11, 1862."

Received the above certificate, which is issued at the request of said depositor, subject to the conditions of agreement with depositors established by the above-named corporation.

In witness whereof the San Francisco Savings Union has caused this certificate to be signed by its president and cashier.

SAN FRANCISCO SAVING UNION v. GEO. OULTON. } No. 2.

L. S.

Cashier. *President.*

(Across the face in red:) Entered. Account No.

Book-keeper.

(On back:)

NOTICE. All parties interested are hereby notified that, in accordance with the laws of the State of California, and the terms of the within certificate, the San Francisco Savings Union will not be bound by any assignment or transfer of the said certificate, or the money mentioned therein, until actual presentation at the office of the corporation and transfer upon its books.

18 .

For value received, I hereby assign and transfer unto

and assigns and personal representatives, the within certificate, and the sum of money mentioned therein, together with all dividends thereon accrued, or to accrue, from and after the commencement of the current fiscal half year.

42 Said plaintiff has been engaged in no business other than as hereinbefore stated.

The plaintiff did not make any return of the amount of its deposits to the assessor of internal revenue for the period mentioned in the complaint, in pursuance of the provisions of the internal revenue laws of the United States. During the period mentioned in the complaint, and thence down to and including the time of the commencement of this action, the defendant, George Oulton, was collector of internal revenue of the United States in and for the first collection district in the State of California, embracing the said city of San Francisco.

Said Oulton, defendant, acting as such collector, before the twenty-third day of February, A. D. 1871, demanded of said plaintiff the sum of three thousand sixty-six & $\frac{63}{100}$ dollars, which amount he alleged and claimed to be due from plaintiff to the United States, as and for the one twenty-fourth ($\frac{1}{24}$th) of one per cent. per month for moneys deposited with the plaintiff in the business of banking during the months of August and September, A. D. 1870, and alleging and claiming that the said sum of three thousand sixty-six & $\frac{63}{100}$ dollars was due from the plaintiff for delinquent taxes. The said plaintiff refused to pay said sum to said defendant, and thereupon, on the twenty-third day of February, A. D. 1871, said defendant levied upon and seized all the money and property of said plaintiff in the State of California, for the
43 non-payment of said taxes, so claimed to be assessed, as aforesaid, and was about to expose said property to sale and sell the same to collect the amount of said taxes, assessed and claimed as aforesaid, by said defendant, and, in order to release said property from said levy, and prevent said sale, the plaintiff, under protest, paid to said defendant the said sum of $3,066.63; whereupon said defendant received said money and released said property from said levy, and returned it to said plaintiff.

Said plaintiff, afterwards, and before the commencement of this suit, demanded of said defendant a repayment of said sum of $3,066.63; but said defendant refused, and he still refuses to pay the same, but he has since paid said money into the Treasury of the United States.

The plaintiff, afterwards, in due time, appealed to the Commissioner of Internal Revenue of the United States from the said assessment so made, and to collect which said seizure was made, in accordance with the provisions of the statute and of the regulations of the Secretary of the Treasury in pursuance thereof, in such case made and provided, and, upon such appeal, the Commissioner decided against said plaintiff, and that such taxes were legally assessed; and this suit was thereupon brought within six months after the rendering of said decision.

44 And as conclusions of law, the court finds:

1st. That during the period for which said tax was assessed the said plaintiff received no deposits of money subject to payment by check or draft, or represented by certificates of deposits, or otherwise, payable on demand, or at some future day, within the meaning of the revenue acts of the United States.

2nd. That the moneys deposited with said plaintiff during the said time were not subject to the tax assessed thereon and collected by the defendant, and that the said assessment and collection were made without authority of law.

3rd. That the plaintiff is entitled to recover the sum of three thousand sixty-six $\frac{63}{100}$ dollars so illegally assessed and collected.

The decision of Mr. Justice Field on the motion for judgment on the

pleadings in this case must control the judgment on the final hearing, for the facts turn out upon the trial to be, in all essential particulars, the same as shown in the complaint, and as they were assumed to be by the circuit judge for the purposes of his decision.

45 Let judgment be entered for the plaintiff for the sum of three thousand sixty-six $\frac{63}{100}$ ($3,066.63) dollars and costs of suit.

LORENZO SAWYER,
Circuit Judge, Ninth Circuit.

(Endorsed:) Filed 28 Oct., 1871. L. S. B. Sawyer, clerk.

46 *Judgment.*

In the circuit court of the United States, of the ninth judicial circuit, in and for the district of California.

THE SAN FRANCISCO SAVINGS UNION
v.
GEORGE OULTON. } No. 938.

This cause having come on regularly for trial on the 25th day of September, A. D. 1871, being a day in the June term, 1871, of said court, before the court sitting without a jury, a trial by jury having been expressly waived by written stipulation of counsel for the respective parties, duly filed, John R. Jarboe, esq., appearing on behalf of plaintiff, and L. D. Latimer, esq., U. S. attorney, appearing on behalf of defendant, and the evidence on the part of the respective parties having been introduced, and the cause, after arguments of counsel, having been submitted to the court for consideration and decision, and after due deliberation the court having on the 28th day of October, of said year, being a day in the October term, A. D. 1871, of said court, filed its findings in writing, and ordered that judgment be entered in accordance therewith.

Now, therefore, by reason of the law and the finding aforesaid, it is considered by the court that The San Francisco Savings Union,
47 plaintiff, do have and recover of and from George Oulton, defendant, the sum of three thousand sixty-six $\frac{63}{100}$ dollars, and its costs taxed at one hundred and thirty-seven $\frac{43}{100}$ dollars.

Judgment entered the 28th day of October, 1871.

L. S. B. SAWYER, *Clerk.*

A true copy of an original entered in the foregoing-entitled cause, in judgment register C. L., No. 1, p. 494.

Attest, &c:

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed 28th Oct., 1871. L. S. B. Sawyer, clerk.

Certif. to judgment-roll.

48 I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth circuit, in and for the district of California, do hereby certify that the foregoing papers attached together constitute the judgment-roll in the cause entitled "The San Francisco Savings Union v. George Oulton."

Attest my hand and the seal of said circuit court, this 30th day of October, A. D. 1871.

[SEAL.]

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE,
Deputy Clerk.

(Endorsed:) Filed October 30th, 1871. L. S. B. Sawyer, clerk. By J. F. O'Beirne, D. C.

49 I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing 48 written pages, numbered from 1 to 48, both inclusive, are a true copy of the record, and of all proceedings in the cause therein entitled, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of said circuit court, this 14th day of November, 1871.

[SEAL.]

L. S. B. SAWYER, *Clerk.*
By. J. F. O'BEIRNE,
Deputy Clerk.

50 EX. No. 1.—L. S.

SAN FRANCISCO SAVINGS UNION }
v.
GEO. OULTON. }

Fo.] [No.

ORDINARY DEPOSIT.

in account with the S. F. Savings Union.

51 SAN FRANCISCO SAVINGS UNION.

President—JAMES DE FREMERY.
Vice-President—WASHINGTON BARTLETT.
Directors—C. ADOLPHE LOW, GEORGE C. POTTER, CHARLES PACE, CHARLES BAUM, JOHN ARCHBALD, R. B. SWAIN, ALEXANDER CAMPBELL, SEN.
Cashier and secretary—LOVELL WHITE.
Auditor—THEODORE LOESSEL.
Accountant—J. A. LANGSTROTH.
Attorney—HENRY C. CAMPBELL.

Office: 532 California street, N. E. cor. of Webb st., San Francisco.

52 CERTIFICATE OF INCORPORATION.

Know all men by these presents that we, the undersigned, do hereby certify that we have associated ourselves for the purpose of forming a corporation under the provisions of an act, entitled "An act to provide for the formation of corporations for the accumulation and investment of funds and savings," approved 11th April, 1862. And, in conformity with the requirements of said act, we do further certify that the corporate name of said corporation is the "SAN FRANCISCO SAVINGS UNION;'

that the object for which it is formed is that of aggregating the funds and savings of the members of said corporation and of others, and of preserving and safely investing the same for their common benefit; that the time of its existence shall be fifty years from and after the date of the filing of this certificate in the office of the county clerk of the city and county of San Francisco; that the number of the directors who shall manage the affairs of the corporation, during the first six months of its existence, shall be seven, and that their names are JAMES DE FREMERY, JOHN P. BUCKLEY, EDWARD P. FLINT, THOMAS P. BEVANS, WASHINGTON BARTLETT, ALBERT MILLER, and CHARLES PACE. Also that the principal place of business of the said corporation is to be located in the city and county of San Francisco, and State of California.

And in accordance with the seventeenth section of said act, we do hereby further certify that said corporation shall have a capital stock;
that the amount of such capital stock shall be ($100,000) one hun-
53 dred thousand dollars, and that it shall consist of (400) four hundred shares, of the value of ($250) two hundred and fifty dollars each.

In witness whereof we have hereunto set our hands and seals, in the city and county of San Francisco, and State of California, on this sixteenth day of June, A. D. one thousand eight hundred and sixty-two.

H. HANSSMANN.
ISAAC HYDE.
EDWARD P. FLINT.
WASHINGTON BARTLETT.
JOHN ARCHBALD.
GEO. C. POTTER.
L. MAYNARD.
GILES H. GRAY.
ROB'T TURNER.
C. L. TAYLOR.
GEO. F. BRAGG.
HENRY BRICKWEDEL.
IRA P. RANKIN.
JAMES BOWMAN.
THOMAS P. BEVANS.
E. D. WATERS.
ALBERT MILLER.
J. P. BUCKLEY.
JAMES DE FREMERY.
CHA'S F. LOTT.
W'M F. BABCOCK.
JOHN H. SAUNDERS.
A. CAMPBELL.
GEO. H. KELLOGG.
CHA'S PACE.
D. J. OLIVER.
CH'R CHRISTIANSEN.
C. ADOLPHE LOW.
J. FRED. PEAT.
W. C. B. DE FREMERY.
R. B. SWAIN.

Acknowledged before Otis V. Sawyer, notary public.

Filed June 18th, 1862, in the office of the county clerk of the city and county of San Francisco.

Certified copy filed in the office of the secretary of state.

The following gentlemen have become members since the institution was formed, and are, at the present time, (June 1st, 1871,) shareholders in the guarantee capital:

CHA'S J. JANSON.
CHA'S R. PETERS.
SAMUEL WOODS.
TH. LOESSEL.
GEO. W. BEAVER.
A. J. RALSTON.
R. B. WOODWARD.
HENRY C. CAMPBELL.
M. KLINKOFSTROM.
ALBERT DIBBLEE.
H. NIELSEN.
H. S. DE FREMERY.
CHA'S BAUM.
JOSEPH G. EASTLAND.
DAN'L C. MCGLYNN.

54 *Conditions of agreement on which deposits may be made with, and will be repaid by, the San Francisco Savings Union, incorporated June 18th, 1862, under the act to provide for the formation of corporations for the accumulation and investment of funds and savings, approved April 11, 1862.*

1st. Ordinary deposits will be received in sums of not less than one dollar, for drawing which notice may be required as specified below, and term-deposits in sums of not less than one hundred dollars, on a stipulation that at least six months' notice shall be given, in writing, at the office of the corporation, before drawing them. The amounts deposited and drawn out by each depositor will be entered in his pass-book, or certificates will be issued for term-deposits, if preferred. All deposits shall remain with the institution until called for by the depositor or his legal representatives. The directors have power at any time to establish a maximum limit for deposits, as well as to refuse any deposit.

2d. As the deposits must be loaned out, or otherwise invested, in order that interest may be gained upon them, the corporation will only engage to repay depositors when there is money on hand which the board of directors may not deem it necessary to reserve for other payments. As long as this is the case, the cashier will repay term-deposits on the expiration of the term of notice given, and ordinary deposits on demand, or after expiration of the following notice, whenever the directors may require such notice of the depositors, namely:

55 No. 56

DR. *In ordinary deposit acc't with the San Francisco Savings Union.* CR.

57 For sums over $50 and less than $100, three days.
For sums of $100 and over, but less than $1,000, ten days.
For sums of $1,000 and upwards, thirty days.

In case the depositor who may have applied for an ordinary deposit shall not come forward to receive his money within three days after the term of notice shall have expired, the application will be considered as withdrawn. If in the same manner term-depositors should not come forward, their notice will be considered cancelled.

If a term-depositor should wish to draw his deposit, or to change it to an ordinary one, the board of directors may consent to his doing so if they shall see fit, but in case of such change said depositor shall lose one month's dividend upon his deposit.

3d. When there is not money enough on hand to repay all the deposits

In the Supreme Court of the United States.

DECEMBER TERM, 1872.

GEORGE OULTON, *Collector of Internal Revenue, Plaintiff in Error,*
vs.
THE GERMAN SAVINGS AND LOAN SOCIETY.
} No. 205.

In error to the Circuit Court of the United States for the District of California.

BRIEF FOR THE PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

DECEMBER TERM, 1872.

GEORGE OULTON, *Collector of Internal Revenue, Plaintiff in Error,*
vs.
THE GERMAN SAVINGS AND LOAN SOCIETY.
} No. 205.

In error to the Circuit Court of the United States for the District of California.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT.

This was an action brought by a savings bank to recover back a tax of one twenty-fourth ($\frac{1}{24}$) of one per cent. per month for moneys deposited in the savings bank during the month of August, 1870.

The case was originally brought in the State court, and removed thence by *certiorari* to the United States circuit court, where trial by jury was waived, and the case tried by the circuit judge, who found the facts stated in the Record on pages 12–14.

The bank was organized under the California law for organizing savings and loan corporations, (Civil Code of California, sections 286, 571, *et seq.*,) and had a capital stock of $100,000, of which $60,000 had been paid in cash, and for the rest the notes of shareholders had

been given. The capital stock is a part of the security which the depositors have. After paying expenses, 5 per cent. of the net profit of the bank is set aside for a reserve fund, and then 10 per cent. of the remainder is set apart for the stockholders, who do not otherwise share in the dividends. And the reserve fund and the interest thereon is lent out and disposed of in the same manner as the deposits, and is kept in the same manner as the capital stock, as security for the depositors.

The bank receives deposits, lends the money so deposited, and repays it, together with the dividends arising from the interest on loans to depositors, in accordance with the terms, conditions, and plans stated in a prospectus issued by the bank to depositors in a pamphlet, and an agreement thereto appended, which are printed on Record, pp. 10, 11, 12.

Every depositor, upon making a deposit, signs this agreement, and no money is received on deposit or held otherwise than upon the terms and conditions set forth in the prospectus and agreement.

No accounts have ever been opened, nor moneys received subject to payment on draft, check, or order. When a deposit is made a pass book is given to the depositor and an entry of the deposit made in it and in the books of the bank, and the money is drawn out by presentation of the pass book by the depositor, or a person holding his order.

The Savings Bank always intends to keep sufficient money on hand to meet all ordinary demands when made, and it always pays money upon calls, and there has never been a time since the organization of the

bank that it would not have been able to meet all ordinary demands. On large amounts it generally asks depositors to give a day or more notice, but the company has never been obliged to make a rule requiring notice.

Loans are usually made on real-estate security, but at times upon security of bullion or personal property.

The bank issues no certificates of deposits except temporary certificates for the purposes stated in the Record, p. 13.

As conclusions of law, the court found—

1. "That during the period for which said tax was assessed, the said plaintiff received no deposits of money subject to payment by check or draft, or represented by certificates of deposits or otherwise, payable on demand, or at some future day, within the meaning of the revenue acts of the United States.

2. "That the moneys deposited with said plaintiff during the said time were not subject to the tax assessed thereon and collected by the defendant, and that the said assessment and collection were made without authority of law.

3. "That the plaintiff is entitled to recover the said sum of two thousand six hundred and ninety-seven $\frac{84}{100}$ dollars so illegally assessed and collected."

The court accordingly gave judgment for the plantiff.

ASSIGNMENT OF ERRORS.

1. As this bank had a capital stock of $100,000, it does not fall within the proviso of the act of July 13, 1866, (14 Stats. at Large, 137,) exempting certain savings banks from taxation.

2. As the bank set aside nearly ten per cent. of the net profits for the stockholders, who furnished the

capital, it did other business than receiving deposits "to be loaned or invested for the sole benefit of the parties making such deposits without profit or compensation to the association or company."

3. The deposits made in this bank were deposits "subject to payment by check or draft, or represented by certificate of deposit or otherwise," within the meaning of the statute.

ARGUMENT.

I.

By section 110 of the act of June 30, 1864, it was provided—

"That there shall be levied, collected, and paid a duty of one twenty-fourth of one per centum each month upon the average amount of the deposits of money, subject to payment by check or draft, or represented by certificates of deposit or otherwise, whether payable on demand or at some future day, with any person, bank, association, company, or corporation engaged in the business of banking; * * * *Provided*, That this section shall not apply * * * to any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning the same on interest for the benefit of the depositors only, and which do no other business of banking." 13 Stats. at Large, 277, 278.

By the act of March 3, 1865, (*ibid.*, 479,) it was enacted that the above section be amended by striking out the words of the proviso here quoted.

This court then held that a savings bank without any capital, and without shareholders or corporators interested or entitled to participate in the profits of the institution, was liable to taxation as a bank.

Bank for Savings *vs.* The Collector, 3 Wallace, 495.

In that case Mr. Justice Clifford said that savings banks, "as banks of deposit, did fall directly within the words of the first clause of the section, and therefore it became necessary to insert the proviso near the close of the section, to exclude them from the otherwise plain meaning and operation of the clause, * * * the receiving of deposits and loaning the same on interest for the benefit of the depositors is a business of banking." (*Ibid.*, 511.)

The statute under which the present tax was assessed is section 110 of the act of 1864, as amended by the act of July 13, 1866, whereby it is provided—

"That there shall be levied, collected, and paid a tax of one twenty-fourth of one per centum each month upon the average amount of the deposits of money subject to payment by check or draft, or represented by certificates of deposit or otherwise, whether payable on demand or at some future day, with any person, bank, association, company, or corporation engaged in the business of banking. * * * And the deposits in associations or companies known as provident institutions, savings banks, savings funds, or savings institutions, having no capital stock, and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company, shall be exempt from tax on so much of their deposits as they have invested in securities of the United States, and on all deposits less than five hundred dollars made in the name of any one person."

14 Stats. at Large, 136, 137.

The case of the Society for Savings *vs.* The Collector, *ubi supra*, would seem to decide that a savings bank, even without a capital stock, is a banking institution

within the meaning of the body of the above section, and, without any proviso, would be liable to taxation on its deposits.

See language of the court at pp. 510, 511, 513.

A fortiori, a savings bank with a capital stock would fall within it, and the proviso by expressly excluding from the operation of the body of the section savings banks with no capital stock, shows that savings banks having a capital stock fall within it.

"***Expressio unius, exclusio alterius***," says Mr. Justice Hoar, "is a maxim which applies as forcibly to the exceptions of an obligation as to the enumeration of the objects to which the contract applies."

Higginson *vs.* Weld, 14 Gray, 165, 172.

II.

This savings bank not only has a capital stock, but it is carried on as much for the profit and benefit of the stockholders or shareholders as of the depositors.

There are undoubtedly numerous savings institutions in the country which have been established by benevolent people solely for charitable purposes, and for the benefit of the poor, without any wish or desire on the part of the members of the association to gain any advantage therefrom. But it is likewise a notorious fact that most applications that are made to legislatures for acts of incorporation for savings banks are made by persons not so anxious to do good to the poor as to have a fund at their disposal which they can lend on advantageous terms to themselves and to their friends. Such motives, however, are not within the cognizance

of courts, and no indirect advantage of that kind which the members of the association may receive will deprive the association of the benefits of this proviso.

But this case is widely different. After setting aside 5 per cent. as a reserve fund, which, together with the capital stock, is to bear the losses in the first instance, the company sets aside 10 per cent. of the remainder of its profits for the shareholders.

Now, it is very clear that, in a case where a company similar to this has general confidence, and does a large business, the profits which will accrue to the shareholders greatly exceed those which will accrue to the depositors.

Suppose, for example, that this bank, with a paid-in capital of $60,000, had a million dollars on deposit, and its net profits amounted to $60,000 a year. Five per cent. of that, or $3,000, would be set aside for the benefit of the reserve fund, and 5 per cent. of the remainder, or $5,700, for the shareholders, and the remaining $51,300 would remain for the benefit of the depositors—that is to say, from the earnings of the year, the shareholders would receive between 9 and 10 per cent. on their investments, and the depositors only little more than 5 per cent. An association conducted on such a principle cannot be said to be receiving deposits "loaned or invested for the sole benefit of the parties making such deposits without profit or compensation to the association or company."

III.

The German Savings and Loan Society is a bank within the meaning of the first clause of section 110, namely, a bank having deposits of money "subject to payment by check or draft, or represented by certificates of deposit or otherwise, whether payable on demand or on some future day." That the pass book of the savings bank comes within the words "subject to payment by check or draft or represented by certificates of deposit or otherwise," is settled by the case of the Society for Savings *vs.* The Collector, *ubi supra;* and the only distinction that can be drawn between that case and the present one, is in regard to the manner in which the deposits are repaid by the association. By the prospectus "deposits are divided into two different classes, viz:

"1. Deposits in sums not less than two dollars reimbursable after demand from the first disposal funds. A maximum limit for such deposits may be fixed from time to time by the board of directors. As the deposits must be loaned out, in order that interest may be earned upon them, the corporation will only undertake to repay depositors when there is money on hand which the board of directors have not reserved for other payments. As long as this is the case, the secretary or treasurer will repay such deposits immediately after demand.

"2. Deposits in sums not less than fifty dollars, for a term not less than six months, for the withdrawal of which notice in writing must be given at least six months in advance." (Record, p. 11.)

These provisions bring this association substantially within the language of the body of the 110th section. The fact that notice is required for the payment of what is called a term deposit does not render the bank less liable to pay the money. Notice was requisite in the case of the New York Savings Bank.

See 3 Wallace, 497.

The only difference between that case and this being that *there* the payments could only be called for on four stated days in the year, and upon a week's notice; here they can be called for at any time after six months' notice.

But this is a bank of deposit, within the meaning of section 110, for the reasons already partly stated under the first assignment of errors. The case of the Savings Bank *vs.* The Collector has settled the question that the language of the body of the 110th section is broad enough to include savings banks as banks of deposit, without regard to the proviso. And this being so, it would be too great a refinement to construe the statute to include savings banks of the character of the Bank for Savings in the city of New York, and not to include such savings banks as the one which is a party to this suit, the only difference between them being in the regulations governing the withdrawal of the deposits. If the body of the section is broad enough to include savings banks at all, as this court has decided, then it must apply to all savings banks except that class which is excluded by the proviso.

Section 79 of the same act, as amended in 1866, pro-

viding for a special tax upon bankers, thus defines a bank:

"Every incorporated or other bank, and every person, firm, or company, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker: *Provided*, That any savings bank having no capital stock, and whose business is confined to receiving deposits, and loaning or investing the same for the benefit of its depositors, and which does no other business of banking, shall not be subject to this tax."

14 Stats. at Large, 115.

See, also, United States *vs.* The Farmers' Loan and Trust Company, 3 Int. Rev. Rec., 62.

The decision of Mr. Justice Field, in the circuit court of the United States in this case, was given on a motion in the nature of a demurrer to the complaint, and not upon the case, as developed by the facts proved.

German's Savings and Loan Society *vs.* Oulton, 14 Int. Rev. Rec., 138.

C. H. HILL,
Assistant Attorney General.

Supreme Court

OF THE UNITED STATES.

GEORGE OULTON, COLLECTOR,

against

THE GERMAN SAVINGS & LOAN SOCIETY.

Brief and Points of Appellee.

JOHN R. JARBOE,

CHARLES E. WHITEHEAD,

Of Counsel.

NEW YORK:

EVENING POST STEAM PRESSES, 41 NASSAU STREET, CORNER LIBERTY.

1873.

Supreme Court

OF THE UNITED STATES.

GEORGE OULTON, COLLECTOR OF Internal Revenue, Plaintiff in Error, *agst.* THE GERMAN SAVINGS AND LOAN SOCIETY.	No. 205.

Brief and Points of the Appellee.

This action was commenced in the District Court of the Fifteenth Judical District of the State of California, in and for the city and county of San Francisco, by the service of a summons and complaint on the 16th day of March, 1861 (fol. 18), and the same was removed by the appellant by *certiorari* (fol. 7) to the

Circuit Court of the United States for the Ninth Circuit. The complaint was for the recovery of a tax claimed to have been illegally exacted from the appellee.

The appellee filed his answer of general denial April 22d, 1871 (fol. 21), and thereupon moved for judgment upon the pleadings (fol. 45), and this motion came on for hearing before Mr. Justice Field, in the Circuit Court of said Ninth District, and was denied September 18th, 1871. The opinion given on this motion is found at length at fol. 43, *et. seq.*

Thereupon, and on September 25th, 1871, the appellant filed his amended answer (fol. 23), and the cause thus at issue came on for trial on the 25th of September, 1871, before Hon. Lorenzo Sawyer, Circuit Judge of the Ninth Circuit, without a jury. This judge found the facts in dispute, and his conclusions of law thereupon (fol. 38), viz.: "That the plaintiff received no deposits of money, subject to payment by checks or draft, or represented by certificates of deposit, or otherwise payable on demand or at some future day, within the meaning of the Revenue Acts of the United States.

That the moneys deposited were not subject to the tax assessed and collected.

And that the plaintiff is entitled to recover the sum so illegally assessed and collected."

Upon this decision, judgment was entered in favor of the appellee for $2,697.84, and costs (fol. 40), from which judgment the appellant appeals to this Court.

The case of the same appellant against the San Francisco Savings Union, being No. 206 on the calendar, was of a similar character, and was tried by the same judge and at the same time, and it is conceded that the result of the appeal in the first cause will govern that.

The sole qustion that arises is, whether the savings institution, which is the appellee before this Court, is such an institution that it becomes liable to the tax

imposed upon "*persons or corporations engaged in the business of banking upon the average amount of deposits subject to payment by check or draft, or represented by certificates of deposit or otherwise, whether payable on demand, or at some future day.*"

The law under which this tax was levied is section 110 of the Internal Revenue Act, as amended July 13, 1866, and that portion of said section relating to this matter reads as follows:

Section 110. *And be it further enacted*, That there shall be levied, collected and paid, a tax of one-twenty-fourth of one percentum each month upon the average amount of the deposits of money, *subject to payment by check or draft*, or represented by certificates of deposits or otherwise, *whether payable on demand or at some future day*, with any person, bank, association, company, or corporation engaged in the business of banking; and a tax of one-twenty-fourth of one percentum each month, as aforesaid, upon the capital of any bank, association, company, or corporation, and on the capital employed by any person in the business of banking, beyond the average amount invested in United States Bonds; and a tax of one-twelfth of one percentum each month upon the average amount of circulation issued by any bank, association, corporation, company, or person, including, as circulation, all certified checks and all notes and other obligations calculated or intended to circulate, or to be used, as money, but not including that in the vault of the bank, or redeemed and on deposit for said bank; and an additional tax of one-sixth of one percentum each month upon the average amount of such circulation issued as aforesaid, beyond the amount of ninety percentum of the capital of any such bank, association, corporation, company or person. * * * * * * *

Provided, That this section shall not apply to associations which are taxed under and by virtue of the Act "to provide a national currency, secured by pledge

of United States bonds; and to provide for the circulation and redemption thereof." And the deposits in associations or companies, known as provident institutions, savings banks, savings funds, or savings institutions, having no capital stock, and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company, shall be exempt from tax on so much of their deposits as they have invested in securities of the United States, and all deposits less than five hundred dollars made in the name of any one person; and the returns required to be made by such provident institutions and savings banks after July, eighteen hundred and sixty-six, shall be made on the first Monday of January and July of each year, in such form and manner as may be prescribed by the Commissioner of Internal Revenue.

See 14 U. S. Statutes at Large, p. 136.

The appellee is an organization created under the Statute of the State of California entitled "An Act to provide for the formation of corporations for accumulations and investments of funds and savings," approved April 11, 1862 (Stat. of Cal., 1862, 199), Hittell's Digest, Sec. 1,097 to 1,124), and by those laws had power to regulate the conditions on which deposits should be received, § 1,100. No moneys deposited with it were deposited save under the following contract (fol. 32), prepared by the corporation.

AGREEMENT (fol. 32).

In consideration of the receipt by The German Savings and Loan Society of the deposits now made, and hereafter to be made, by me with it, I do hereby, for myself, my heirs, executors, administrators and assigns, covenant, promise and agree to and with said The German Savings and Loan Society to be governed

in all respects with regard to all moneys that may be deposited by me with said society, by the conditions above written and by the by-laws of said society; and that *all moneys now or hereafter deposited by me with said The German Savings and Loan Society, shall be re-imbursable only out of the first disposable funds that shall come into the hands of the said The German Savings and Loan Society, after the date of any demand for the re-imbursement thereof, and after payment of all sums for the re-imbursement of which demand shall have been made prior to the date of my demand;* and I do hereby for myself, my heirs, executors, administrators and assigns, waive all claim for indemnification for losses against all present and future members of said corporation, and elect to rely solely upon the guarantee capital and reserve fund of said The German Savings and Loan Society.

Witness my hand and seal, this day of A. D. 187

Nor were deposits made with the San Francisco Savings Union except under the provisions of a contract in the following words:

Conditions of agreement on which deposits may be made with, and will be repaid by, the San Francisco Savings Union, Incorporated June 18th, 1862, under the Act to provide for the Formation of Corporations for the Accumulation and Investment of Funds and Savings, approved April 11th, 1862.

1st. Ordinary deposits will be received in sums of not less than one dollar, for drawing which notice may be required as specified below, and term deposits in sums of not less than one hundred dollars, on a stipulation that at least six months' notice shall be

given, in writing, at the office of the Corporation, before drawing them. The amounts deposited and drawn out by each depositor will be entered in his passbook, or certificates will be issued for term deposits, if preferred. All deposits shall remain with the institution until called for by the depositor or his legal representatives. The Directors have power at any time to establish a maximum limit for deposits, as well as to refuse any deposit.

2d. As the deposits must be loaned out, or otherwise invested, in order that interest may be gained upon them, *the corporation will only engage to repay depositors when there is money on hand, which the Board of Directors may not deem it necessary to reserve for other payments.* As long as this is the case, the cashier will repay term deposits on the expiration of the term of notice given, and ordinary deposits on demand, or after the expiration of the following notice, whenever the directors may require such notice of the depositors, namely :

For sums over $50 and less than $100, three days.

For sums of $100 and over, but less than $1,000, ten days.

For sums of $1,000 and upwards, thirty days.

In case the depositor who may have applied for an ordinary deposit shall not come forward to receive his money within three days after the term of notice shall have expired, the application will be considered as withdrawn. If, in the same manner, term depositors should not come forward, their notice will be considered canceled.

If a term depositor should wish to draw his deposit, or to change it to an ordinary one, the Board of Directors may consent to his doing so if they shall see fit, but in case of such change said depositor shall lose one month's dividend upon his deposit.

3d. *When there is not money enough on hand to repay all the deposits applied for, the Directors shall make no*

new loans nor investments until there is again sufficient money on hand to meet the current applications; and if the demand shall, in their judgment, become excessive or general, they shall have power to set aside all applications previously made which may not have been satisfied, and to order an apportionment of all the funds, as they may be got in, and at such short intervals as they may judge proper, among all the ordinary depositors, in proportion to the amount of their deposits; term depositors, who shall have given notice, shall, as soon as the stipulated term of notice shall have passed, be placed on the same footing as ordinary depositors whose notice has expired; and any funds not called for when thus apportioned, shall be carried into the next periodical apportionment. But the Directors shall in all circumstances have power to provide for the expenses of the corporation, and for any other lawful payments which they may deem necessary (such as dividends, loans, or investments previously contracted for, &c.), before making any apportionment.

4th. At the expiration of every six months, ending June 30th and December 31st of each year, the Board of Directors shall ascertain the net profits of the corporation, and shall determine the amount to be appropriated for a general dividend. Not less than nine-tenths of said amount shall form a dividend, to be declared and payable upon the guarantee capital (capital stock), the reserve fund and all deposits, at a monthly or yearly rate. The amount of dividend apportioned upon each account shall be in proportion to the time during which the several amounts represented by such account shall have formed part of the funds of the corporation, except that deposits will not begin to draw dividend until one month after they are made; and the rate of dividend upon ordinary deposits shall be increased by twenty per cent., to form the rate upon funds remaining permanently in the hands of the corporation, including term deposits. The remaining

portion of the amount for general dividend, determined by the Board of Directors as aforesaid, shall belong to the stockholders of the corporation, in compensation for the security which the guarantee capital affords to depositors; but out of said portion, enough shall be set aside from time to time to form a reserve fund, which, although belonging to the stockholders, shall not be withdrawn or paid to them until the dissolution of the Corporation; but it may be converted into guarantee capital, and the formation of a new reserve fund provided for.

5th. Dividends will be payable during the six months next after the date on which they may have been declared, in preference to deposits; but thereafter, they will be payable only in the same way as the balances of the accounts to which they may belong, and all dividends not drawn within the first thirty days will share in the next dividend from the date on which they have been declared.

The Board of Directors shall, from time to time, establish a rate of interest to be paid to depositors who may wish to take such rate in lieu of dividend, on drawing the balances of their accounts between one dividend day and another. Neither this rate of interest, nor dividends, shall be paid upon fractions of dollars.

On all amounts drawn out during any time when the making of new loans is declared suspended on account of excess of applications for repayment, no interest or dividend will be allowed from and after the date of the next previously declared dividend, unless the applications for such amounts shall have been made at least three days previously to such declaration that no new loans are being made.

6th. The directors will use their best judgment in making loans or investments, within the limitations of the Statute under which the San Francisco Savings

Union is incorporated, looking first and principally to security, and in the second place to profit.

All interest, rents or other revenues received by the corporation and any profit or loss which it may make on the purchase and resale of any real estate on which the corporation may make loans, or on personal property in the case provided for by the Statute, shall be added to or taken out of the next dividend. All losses of the principal sum of amounts loaned, or of any part of such principal sum, shall be paid out of the reserve fund, as soon as the property shall be disposed of, and the principal sum shall be accounted for before reckoning interest. The reserve fund shall be kept up from the same source from which it is to be formed, and if it shall at any time be insufficient to meet all the losses suffered, then these shall be paid out of the guarantee capital, so that the said reserve fund, together with the guarantee capital and the assets of the corporation, shall form an absolute security to depositors for the amount of their deposits and declared dividends.

7th. It is distinctly agreed and understood that, in consideration of the security thus afforded, each depositor, by signing these conditions, waives any and all claim or claims, whether founded upon the Statutes or upon the Constitution of this State, which, without this stipulation, he might have, to hold any individual corporator or corporators, officers, members or stockholders of this corporation, or his, her or their heirs, executors, administrators or assigns, personally liable, jointly or severally, for any losses; and consents to look for his or her security solely to the guarantee capital, to the reserve fund and assets of the corporation.

I, having been made acquainted with the above conditions, am satisfied with the same, and I do hereby agree to be

governed by them in regard to any and all deposits which I may make with the San Francisco Savings Union; in testimony whereof, I have hereunto subscribed my name.

SAN FRANCISCO, 18 .

On the trial, the Court below found, as a question of fact, on which there was no dispute, that "no accounts had ever been opened or moneys received subject to payment on draft, check or order" (fol 34.)

The Court also found, as a finding of fact, that "when the money is drawn, the depositor presents his pass-book, receives his money, and signs a receipt for it on the books of the bank, and an entry is made in the passbook. Sometimes the depositor cannot appear in person to receive his money; he then sends an order with the pass-book, and on the production of the pass-book and order, the order is taken as a receipt, and either pasted in the receipt-book or receipt entered in receipt-book, and a reference thereon to the order is made in the receipt-book as paid as per order, such a number and the entry made in the pass-book. No such order is ever paid without a presentation of a pass-book with the order."

POINTS.

First Point.—The INTENTION of Congress was to impose a tax upon capital engaged in banking. Bank capital is composed in part of the money paid in as capital, in part of the money derived from circulation, and in part from the temporary deposits made by depositors, for which the bank pays no interest, and which is subject to be drawn upon at any time.

Capital circulation and deposits form an aggregate fund in a bank in daily use by the bank for its own benefit, the profits from which do not go to the depositor but to the bank, and are the gains of the stockholders.

This capital it was intended to tax. In proof that it was not intended to tax any further the Statute contains an express exemption from taxation of that which is in the vaults of the bank, and also that which has been redeemed and is on deposit.

No interest is paid by the banks on moneys which are deposited with them, and are subject to be checked out at any time. All the profits, therefore, belong to the bank. Interest is paid at a low rate in Savings Banks to their depositors, but the bank makes its profits in lending at high rates, and most of their deposits are in small sums, and therefore exempt.

Therefore, in preparing the act to tax bank capital, the Statute framers provided a tax on the bank's capital *eo nomine*, a tax on the amount represented by the bank's circulation, and also a tax upon all such deposits as were represented in the hands of the depositors by certain designated certificates, "*or otherwise*," meaning by any other means which could possibly make the depositor a holder or user, or give him credit upon the moneys which were deposited with the bank.

Whether the words used express that idea in the clearest way that words could is a question, that such was the purpose for which the section was drawn is undoubted.

Second Point.—The appellee is not liable to taxation under the enacting clause of the act, as it was not a bank, nor engaged in the business of banking within the meaning of the act.

To render plaintiffs liable, therefore, they must appear to be a bank or a corporation engaged in the business of banking, and holding *deposits* subject to *payment* by check, draft, or otherwise.

The terms bank and banking have been defined by the express terms of the Revenue Act.

See Statutes at Large, vol. 14, p. 115, which reads as follows:

> Every incorporated or other bank, and every person, firm or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes, or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker.

Again, bank *is* defined (see Bouvier's Law Dictionary titled "Bank") as a place for the deposit of money—an institution authorized to receive deposits, to lend money, and to issue promissory notes usually known as bank-notes.

Banks are of three kinds—of deposit, discount and circulation; and the distinct feature of a liability to repayment at a definite time is recognized in all their definitions. It is clear, however, from an inspection of sec. 110 that a mere naked bank of deposit, with no obligation of repayment, is not taxable, because it is provided that only such *deposits* as are subject to *check* or *draft*, or represented by certificates of deposit or otherwise, payable on *demand* or in *future*, shall be taxable.

The society in question received deposits which it loaned out for the benefit of the depositors, giv-

ing the depositors all the net profits. These deposits were in nowise payable to the depositors by the bank, except when the loan should be paid in by the person to whom it might be loaned. It had neither circulation, checks, drafts, certificates of deposits or exchange—it was simply A TRUSTEE TO INVEST.

Such institutions have been repeatedly decided not to be banks in legal language.

In the State of Lousiana *agst.* The Louisiana Savings Co., 12 La. R., 572, the Court says:

"The rigid rules of our laws relative to banking operations are not applicable to this case: they relate to offices of discount, deposit and circulation. This institution is not a *bank* in the sense of the Statute, and it is clear that the Legislature did not intend to incorporate a bank. The act authorizes a corporation and calls it a corporation and not a bank, and it has no power to issue notes for circulation. It is evident that Statutes regarding banking corporations do not govern the case at bar.

Third Point.—The appellee is not liable to taxation under the enacting clause of the Statute, as it held no deposit subject to payment by check or draft, or represented by certificates of deposit or otherwise, whether payable on demand or at some future day.

These facts are found by the judge who tried the cause (fol. 34), but it is sought to modify them by criticism upon the manner in which the society did its business.

The rule of its business and the contract with all its depositors was that the money deposited

should only be repaid as the loans might be repaid to the bank.

The provisions of contracts between these Saving Institutions and their depositors have been held to be strictly enforceable even to their smallest detail.

Wall v. *Provident Association*, 3 Allen (Mass.), 96.
S. C., 6 Allen, 321.
Warhus v. *Bowery Savings Bank*, 5 Duer, 67, and 21 New York, 546.

Generally, the well known customs and by-laws of a bank govern the customers even in the absence of an express contract.

Blanchard v. *Hilliard*, 11 Mass., 88.
Jones v. *Fales*, 4 Mass., 252.
Wedging v. *Monroe*, 6 Mass., 451.
Renner v. *Bank of Columbia*, 9 Wheaton, 586, where the custom of days of grace on a promissory note was upheld.

It is clear, therefore, from the provisions of these contracts that no depositor could ever maintain an action for debt or in assumpsit upon these contracts; nor has he any money with either of these banks which is *ex necessitate* payable at any time either on check, draft or order, or is represented by certificate of deposit, *or otherwise*.

These banks, therefore, occupy an anomolous position, and one clearly not contemplated by the Revenue Act. In them the depositors receive the profits and bear the risks of the business, and in so doing occupy a position different from that held by any other class of persons known to the law. If A deposits with the bank of California, his claim is good whether the bank wins or loses

by its management of his funds; but if he deposits with the plaintiffs in this action he has no claim for recovery if the bank shall lose its money by untoward circumstances, national bankruptcy, or any cause that may produce a fall in commercial values. On this point we may suggest to the Court that the case of *Bank of Savings* v. *Collector*, 3 Wallace, 495, relied on by defendant, is not in point. The plaintiff in that case (see statement of facts, p. 497) *could be called* on to make *payments* on four stated days in the year, and therefore four times in each year an action at law would lie against it; it therefore held money payable at some *future time*, and its funds (see p. 497, at bottom) were repayable on *draft*. The case was put by the Court on the very point of *obligation of repayment* (see page 512). Our banks, as we have seen, hold no funds payable by draft, or otherwise, and none of which it can absolutely be predicated that they will ever be repaid.

We submit, then, that this case, for this reason, is no authority against us, and moreover, as is apparent from inspection, the case was decided under a law different in several particulars from the one under consideration.

The very question under consideration came before the Courts in Maine (see *Makin* v. *Savings Institute*, 10 Shepley, 23 Maine R., 350), and the Court held that the bank, defendant, *could* be sued at law because its by-laws provided that it must pay on demand at four stated quarterly days in the year, and for this reason only. It clearly appears from the argument and opinion in that case that this provision in the by-laws (directly the reverse of ours) was the only thing fixing the liability at a suit at law upon defendant.

It is incumbent on the Government to show,

in order to support the tax in question, that plaintiffs are, 1st, bankers who, 2d, hold deposits which, 3d, are subject *absolutely* to be repaid without contingencies; and that in these cases it has failed to establish this proposition; and that it fails to show that plaintiffs did, at any time during the period in question, hold any funds for which, at any time, demand of payment could be made, or for what at any time *assumpsit* in any form would lie.

The views of the appellees are clearly and tersely expressed in the opinion of Justice Field on the motion made for judgment on the pleadings in the Court below at fol. 47.

Fourth Point.—If the general enactment in sec. 110 does not impose a tax upon this society, the proviso in the same section cannot impose it by implication.

A proviso does not enlarge the powers of a Statute.

Dwarris on Statutes, p. 515.
Sedgwick on Statutory Law, p. 62.

Any man who will bring an action for a penalty under an Act of Parliament must show that he is entitled thereto under the enactory clauses.

Speers v. *Parker*, 1 Term, 145.
1 Kent, 463.

And therefore if plaintiffs are not bankers holding deposits on demand or in future, the mere fact

that the proviso declares that savings banks with no capital stocks shall be exempt on certain deposits does not make banks, with or without stocks, liable, unless they come within the enactory clause, and hold deposits payable on demand or in future.

If a statute imposes a tax on all dwelling-houses and stores, and if a proviso exempts all manufactories where steam is used, this does not make manufactories where steam is not used liable, nor does it make anything liable except what the statute declares to be liable.

Also see the opinion of Field, Justice, at folio 45.

Fifth Point.—The construction claimed by the appellant would be unconstitutional, as creating a tax contrary to the provisions of the Constitution of the United States, which provides that all duties and imposts shall be uniform throughout the United States.

This proposition may be illustrated as follows: If A shall deposit with plaintiff the sum of $10,000, and shall loan to B another $10,000, then presuming each to earn legal interest, he would derive from each investment in one year $1,000. On defendant's theory, however, before the plaintiff would pay to A his $1,000 he must deduct 1-24 of one per cent. per month or one-half per cent. for the year; that is to say, $50 for the Government, and will pay to A only $950, while he receives from B $1,000. Having received his two incomes, A goes to the income-tax office and pays five per cent. to the Government on each of these sums; that is to say, out of his $950 he pays $45,

and out of his $1,000 he pays $50; his investment in the bank thus yields him only $905, while his investment with B yields him $950. The result is thus apparent that plaintiffs cannot compete, as borrowers, or lenders, with private individuals, for in the nature of things they cannot receive a greater rate of interest than private citizens, and yet under defendants' construction of the law, they are forced to pay less than they received to their customers, for out of what they receive they must pay one-half of one per cent. per annum to their depositors. That this is an evil not intended by the law is apparent from the fact that this double taxation is carefully guarded against in the statute.

Sec. 7 of the Act of July 13th, 1870.
Statutes at Large, second session of Forty-first Congress, p. 257.

That statute provides that the shares of all persons or the gains or profits of a company shall be included in estimating the gains or income of such persons, thus clearly including the dividends derived from investments in these Savings Banks; and then goes on to provide that the amount received from corporations as dividends, where a five per cent. tax has been paid, shall not be included in the income. But no five per cent. tax is paid on dividends to depositors in Savings Banks.

See Act of July 13th, 1870.
See Act law quoted, p. 260.

And the result is therefore clearly this, that inasmuch as the depositors with plaintiffs cannot show to the tax-gatherer that their dividends have paid a five per cent. tax as dividends, they must pay to him a five per cent. tax then as income, though in another shape the whole capital

has paid a tax of one-half of one per cent. as a deposit tax.

The old law, as it stood prior to July, 1870, as to exceptions, was precisely the same.

Sec. 120 of the Revenue Act, as amended July 13th, 1866, 14 Statute at Large, p. 138; and Sec. 117, of same Act as amended March 1867, 14 Statutes at Large, p. 178.

The law, therefore, on this point has, for the purposes of this argument, always been as it now stands.

The dividends of depositors have been exempt from five per cent. dividend-tax, and therefore subject to five per cent. income-tax, and in addition thereto, subject to one-half of one per cent. tax on the whole amount as deposit-tax.

This one-half of one per cent. on the whole amount is equal, as we have seen, to five per cent. on the earnings in a State where interest is ten per cent. per annum, and in States where interest is less amounts to much more.

The result complained is a double impost of the same nature on the same thing, *i. e.*, earnings, gain or income necessarily results.

This evil is in violation of the Constitution, which provides that duties, imposts and exercises must be uniform.

Constitution, Art. 1, sec. 8.

We submit, therefore, that this Court will not impose such a construction on the act, but will rather give to its provisions such a meaning as will render them conformable to the general rule of taxation throughout the country, and exempt the customers of plaintiffs from a double tax.

JOHN R. JAREOE,
CHARLES E. WHITEHEAD,
Of Counsel.